134

Supreme Court, U.S.
FILED
JUL 15 2009
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2008
No. 09-100

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

vs.

RAYMOND DESHA DAVIS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

KYM L. WORTHY
Wayne County Prosecuting Attorney

TIMOTHY A. BAUGHMAN
Chief of Research, Training and Appeals

DAVID A. MCCREEDY (P56540)*
Assistant Prosecuting Attorney
1441 St. Antoine, 11th Floor
Detroit, Michigan 48226
(313) 224-3836

*** Counsel of Record**

STATEMENT OF THE QUESTIONS

I.

The test for "custody" for *Miranda* warnings is not whether a reasonable person would believe that he was not free to leave, but rather whether the individual's freedom of action is curtailed to a "degree associated with formal arrest," and so *Miranda* warnings are not required at routine traffic stops or *Terry* stops. *Michigan v. Summers* permits the temporary detention of persons on the premises during the execution of a search warrant to ensure the full and safe execution of the warrant. Must *Miranda* warnings be given before any person so detained may be asked even the most cursory of questions?

II.

Pennsylvania v. Muniz and *New York v. Quarles* seemingly allow the police to ask arrestees questions that elicit incriminating answers—without giving the *Miranda* warnings—so long as the questions also have valid safety or administrative justifications. Without giving *Miranda*, the police asked a group of search-warrant detainees "who lives here?" because they wanted to know if any other persons, dangerous animals, or weapons were present, and whom to give the return to; but they also used respondent's affirmative answer to connect him to the drugs. Did the Michigan state courts erroneously exclude respondent's answer because he was not first mirandized?

III.

Under *Missouri v. Seibert*, the police may continue questioning a suspect even after they have improperly obtained an un-mirandized confession from him, as long as they properly give him the warnings and do not leverage the first statement to obtain the second. After respondent admitted he resided in the drug house, officers gave him the *Miranda* warnings, and he then confessed that some of the drugs were his. Does *Seibert* require suppression of the mirandized statement?

TABLE OF CONTENTS

Page

Statement of the Questions ..... -1-

Table of Authorities ..... -5-

Petition ..... -7-

Opinions Below ..... -8-

Statement of Jurisdiction ..... -8-

Constitutional Provisions Involved ..... -8-

Statement of Facts ..... -9-

Reasons for Granting the Writ ..... -13-

I. To clarify that *Summers* detainees are not entitled to *Miranda* warnings. ..... -13-

II. To ratify *Pennsylvania v. Muniz*'s implicit holding that an arrestee may be asked questions which have an objectively permissible administrative or safety-related purpose, even if the responses will likely also be incriminating. ..... -17-

III. To correct the misunderstanding and misapplication of *Missouri v. Seibert*, and to clarify its 4-1-4 holding. ..... -20-

Conclusion ..... -25-

Relief ..... -28-

Appendix A: Court of Appeals opinion ..... -1A-

Appendix B: Michigan Supreme court Order denying leave to appeal ..... -8A-

Berkemer v. McCarty,
468 U.S. 420, 104 S.Ct. 3138 (1984)
. 14,15,16,17

California v. Beheler,
463 U.S. 1121, 103 S.Ct. 3517 (1983)
. 14,15,17

Michigan v. Summers,
452 U.S. 692, 101 S.Ct. (1981) . . . 14,16,17,28

Miranda v Arizona,
384 U.S. 436, 86 S.Ct. 1602 (1966) . . . passim

Missouri v. Seibert,
542 U.S. 600, 124 S.Ct. 2601 (2004)
. . . . . passim

New York v. Quarles,
467 U.S. 649, 104 S. Ct. 2626 (1984) . . . 20,21

North Carolina v. Butler,
441 U.S. 369, 99 S. Ct. 1755 (1979) 27,28

Oregon v. Elstad,
470 U.S. 298, 105 S.Ct. 1285 (1985)
. . . . . passim

Pennsylvania v. Muniz,
496 U.S. 582, 110 S. Ct. 2638 (1990)
. 19,20,21,29

Rhode Island v Innis,
446 U.S. 291, 100 S.Ct. 1682 (1980) 10,12

Stansbury v. California,
511 U.S. 318, 114 S. Ct. 1526 (1994) 16

U.S. v. Bennett,
329 F.3d 769 (CA10 2003) 28

U.S. v. Burns,
37 F.3d 276 (CA 7 1995) 17

U.S. v. Craighead,
539 F.3d 1073 (CA9 2008) 28

U.S. v. Davis,
530 F.3d 1069 (CA9 2008) 17,28

U.S. v. Fike,
82 F.3d 1315 (CA 5, 1996), overruled in part on other grounds, *U.S. v. Brown*, 161 F.3d 256 (CA 5, 1998) 17

U.S. v. Kim,
292 F.3d 969 (CA9 2002) 28

U.S. v. Mittel-Carey,
493 F.3d 36 (CA1 2007) 29

U.S. v. Newton,
369 F.3d 659 (CA2 2004) 28

U.S. v. Ritchie,
35 F.3d 1477 (CA 10 1994) 17

U.S. v. Thompson,
496 F.3d 807 (CA7 2007) 28,29

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2008

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

RAYMOND DESHA DAVIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

NOW COMES the State of Michigan, by KYM L. WORTHY, *Prosecuting Attorney for the County of Wayne*, TIMOTHY A. BAUGHMAN, *Chief of Research, Training, and Appeals*, and DAVID A. MCCREEDY, *Assistant Prosecuting Attorney*, and prays that a Writ of Certiorari issue to review the judgment of the Michigan Court of Appeals, entered in this cause on December 18, 2008, leave denied by the Michigan Supreme Court on May 1, 2009.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is unpublished, and appears as Appendix A. The order of the Michigan Supreme Court denying leave to appeal appears as Appendix B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be . . . compelled in a criminal case to be a witness against himself . . . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Detroit Police Officers executing a narcotics search warrant found respondent, along with drugs and guns, in the targeted home. After admitting that he lived there and that at least the marijuana was his, respondent was charged with possession of ecstasy, possession of a firearm by a felon, possession with intent to deliver marijuana, possession of a firearm during the commission of a felony, and with being an habitual third offender. In the trial court, respondent filed a motion to suppress the two statements he made while in the house admitting that he lived there and that the marijuana belonged to him.

Detroit Police Officer Robert Gadwell was the only person to testify at the ensuing evidentiary hearing. He stated that on September 13, 2006, he and other Detroit Police officers executed a narcotics search warrant at 20416 Hull Street in the City of Detroit. (EH, 3-4). As Officer Gadwell entered the house, he saw three individuals in the living room area. (EH, 4). He secured them while the other officers cleared the house. Eventually, respondent was brought into the living room by other officers after having tried to escape by jumping out of a bedroom window. (EH, 6, 16). All the individuals, including respondent, were handcuffed so that the men could not harm the officers or each other. They were told that they were just being detained; Gadwell reiterated at the hearing that they were not under arrest. (EH, 7). Shortly thereafter, Officer Gadwell and other officers started obtaining "basic information" from those individuals, including names, addresses, and birth dates. (EH, 8-9). This is standard procedure at every drug raid. (EH, 11).

Sometime during this process, Gadwell asked if any of them lived there, and respondent said that

he did. (EH, 12). According to Gadwell, the house was still being cleared and he wanted to know if there were others on the premises and whether there might be any animals that would surprise the officers. (EH, 12). And, it was helpful to know who lived there in order to give that person a copy of the search warrant and the return listing all the items seized. (EH, 13). Further, as Gadwell acknowledged on cross-examination, sometimes knowing that a particular person lives in a drug house helps connect them to the recovered narcotics, but the owner is not always the seller, and so other times residency information is not used as evidence. (EH, 47-48). Gadwell estimated that it took half an hour to complete the processing of these four individuals. (EH, 15).

Once the house was cleared, Gadwell told the other officers that respondent lived there, and they in turn informed him that they had found narcotics and guns in the back bedroom from which respondent had initially tried to flee. As a result, the other three persons were ticketed and released, but respondent was arrested. (EH, 15).

As Gadwell led Davis to the back bedroom for questioning, he advised him of his *Miranda* rights. (EH, 16). Gadwell then removed respondent's handcuffs (EH, 17) and had him read out loud the Detroit Police Constitutional Rights Form. (EH, 19). Although Gadwell gave Davis the opportunity to initial each right and to sign the form, respondent refused. (EH, 22). Gadwell then indicated on the form that respondent had his rights explained to him, that he agreed to make a voluntary statement, and that he refused to sign the certificate. (EH, 23). According to Gadwell, it is not uncommon for a suspect to be willing to make a statement but to refuse to sign any paperwork. (EH, 62).

Gadwell then turned to the "Interrogation Record" portion of the form, and again read

respondent his rights. (EH, 26). Gadwell assured Davis that he could stop at any time (EH, 26), then began asking questions to fill out respondent's in-depth personal information, such as his name, nicknames, birth date, address, height, weight, whether he wore glasses, whether he had any tattoos, how long he had resided in the City of Detroit, et cetera. (EH, 27-30). Davis responded to all the proffered questions, including, again, that his address was 20416 Hull. (EH, 28).

After the Interrogation Record was complete, Gadwell asked respondent about the circumstances of the crime, and Gadwell wrote down his questions and respondent's answers verbatim.

Q: Do you understand your rights?
A: Yes.
Q: What were you doing in this house?
A: Chilling. Playing a game.
Q: Why did you run when the police came?
A: I had some weed and I was scared.
Q: What were you going to do with the marijuana?
A: I don't want to say anything. (EH, 31-32).

Once Davis indicated that he no longer wanted to answer, Gadwell's questioning stopped. (EH, 34).

There was no other testimony offered at the hearing, and neither party introduced the transcript from respondent's preliminary examination into evidence.

Judge Carole Youngblood of the Third Circuit Court suppressed respondent's statements, holding that he was "in custody" and therefore required

Miranda warnings before being initially asked if he lived at the house; that the second, *mirandized* statement was tainted by the un*mirandized* first one; and that even if defendant could have validly waived his rights for the second statement, he did not in fact knowingly or voluntarily do so. In so holding, Judge Youngblood relied on alleged facts that were not part of the record. Namely, she believed that Officer Gadwell was not credible because his testimony at the evidentiary hearing was contradicted by fellow officers who testified at respondent's preliminary exam.

The Michigan Court of Appeals affirmed, holding that respondent "could reasonably believe that he was not free to leave" and therefore was "in custody" for *Miranda* purposes when he was first detained. Additionally, Gadwell should have known that his question about who lived there was likely to invoke an incriminating response, and thus it constituted "interrogation." Because respondent was both in custody and interrogated, his statement that he lived there was obtained in violation of his Fifth Amendment rights. Similarly, the second, mirandized statement was also correctly excluded, according to the appellate panel, essentially because the formal statement was fruit of the poisonous tree.

The Michigan Supreme Court denied leave to appeal on May 1, 2009.

REASONS FOR GRANTING THE WRIT

I. To clarify that *Summers* detainees are not entitled to *Miranda* warnings.

Together, three cases from this Court—*Michigan v. Summers*, 452 U.S. 692, (1981), *California v. Beheler*, 463 U.S. 1121 (1983), and *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984)—hold that a subject's detention during the execution of a search warrant does not constitute "arrest" for *Miranda* purposes and, therefore, that he may be briefly questioned about his potential connection to the drugs without being advised of his Fifth Amendment rights. Since respondent here initially admitted that he lived at the dope house while *detained* but not *arrested*, his admission cannot be excluded by the *Miranda* doctrine. Certiorari should be granted both to clarify the holding of *Summers*, *Beheler*, and *Berkemer*, and to correct the Michigan state courts which declined to follow it.

According to the Court in *Beheler*, prophylactic warnings are only required when the subject has been *formally arrested* or has suffered a restraint on his freedom of movement *to the degree associated with a formal arrest*. This is because the *Miranda* notification is meant to protect persons suspected of crimes from the "compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda v Arizona*, 384 US 436, 467; 86 S Ct 1602, 1624 (1966). Thus, even though the *Beheler* Court recognized that "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be

charged with a crime," *Beheler,* 463 U.S. at 1124 (citation omitted), defendant Beheler was *not* "in custody" even when interviewed at the police station, because he was not forced to go there, was told he was not under arrest while there, and was allowed to go back home after the interview. *Id.* at 1122-23. In other words, police interrogations do not automatically require *Miranda* warnings: it is interrogation coupled with formal arrest, or its equivalent, that triggers the warning process.

Both the trial court and the Michigan Court of Appeals blithely posited that any time a suspect is "not free to leave," he is in custody for *Miranda* purposes. But in light of *Berkemer v. McCarty,* 468 U.S. 420, 442, 104 S.Ct. 3138 (1984), both courts should have known better. In *Berkemer,* this Court ruled that a driver whose car was pulled over could properly be questioned as to whether he was intoxicated—without being mirandized. *Id.* at 442. In other words, even though the suspect was clearly not free to leave, he was not "in custody" and thus was not entitled to the *Miranda* warnings before being questioned as to his possible criminal conduct. *Id.* Professor LaFave has stated the holding of *Berkemer* succinctly: the custody question under *Miranda* "is not whether a reasonable person would believe he was not free to leave, but rather whether such a person would believe he was in police custody of the degree associated with *formal arrest.*" LaFave et al., Crim. Proc. (2d ed. 1999), § 6.6(c), p. 526 (emphasis added). And, of course, the inquiry is an objective one, not based on the subjective views of either the officers or the subject being questioned. *Stansbury v. California,* 511 U.S. 318, 322, 114 S.Ct. 1526, 1529 (1994).

Respondent here was merely detained, with others, in the living room of his own house, which

falls far short of the degree of custody associated with formal arrest. In fact, in *Michigan v. Summers,* 452 U.S. 692 (1981), this Court specifically said that persons detained in their own home while the police execute a search warrant are, in the normal course, *not* under arrest. *Id.* at 702. In that case, the defendant was found coming out of his house as the police were entering to execute a search warrant. They detained him, brought him back into the house, and searched him, finding heroin. *Id.* at 693. The search was upheld even though lacking probable cause, because it was more akin to a *Terry* stop than a full-fledged arrest. In fact, according to *Summers* a search-warrant detention is *"substantially less intrusive than an arrest."* *Summers, supra,* at 702 (emphasis added, internal quotation marks omitted).

Correspondingly, this Court said in *Berkemer* that, during a *Terry* stop, officers "may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." *Berkemer,* 468 U.S. at 439, 104 S.Ct. at 3138. In other words, in the Fourth Amendment search-and-seizure as in the Fifth Amendment self-incrimination context, there are different levels of detention, with different rules for each. Detaining a subject to the point of formal arrest requires probable cause, but lesser detentions only require a reasonable, articulable suspicion. And, these latter detentions do not require *Miranda* warnings before initially questioning the subject as to his identity and possible criminal involvement.

The unavoidable conclusion arising from *Summers, Berkemer,* and *Beheler* is that search-warrant detainees may be briefly questioned without being given *Miranda* warnings, similar to a *Terry* stop. And, although this Court has yet to directly

announce that rule of law, the U.S. Courts of Appeals for the Fifth, Seventh, and Tenth Circuits have all recognized that "in the usual case, a person detained during the execution of a search warrant is not 'in custody' for purposes of *Miranda*." *U.S. v. Burns*, 37 F.3d 276, 281 (CA 7, 1995). See also *U.S. v. Fike*, 82 F.3d 1315, 1324-26 (CA 5, 1996), overruled in part on other grounds, *U.S. v. Brown*, 161 F.3d 256, 259 n. 7 (CA 5, 1998); *U.S. v. Ritchie*, 35 F.3d 1477, 1485 (CA 10, 1994). Additionally, while the Ninth Circuit did not mention *Summers* directly, that court has also acknowledged that the police may ask a "moderate number" of questions of a search-warrant detainee—both to ascertain his identity and to confirm or dispel their suspicions about his connection to the drugs—without giving *Miranda*. *U.S. v. Davis*, 530 F.3d 1069, 1082 (2008).

Here, respondent was merely detained with other persons found in the house when Officer Gadwell asked a question of the group: who lives here? At that time, none of them was under arrest. In fact, the men were told they were just being detained; and, those not connected to the guns and drugs were released once the premises was secured. Although all the men were handcuffed for their own safety and that of the officers, they were not isolated in police cars or even taken to separate rooms within the house, let alone taken to the police station.

Further, there is no evidence that the detainees who did not admit to living there were pressed for a different answer. In other words, the questioning was neither pointed, intense, or protracted. None of the men was confronted with the drugs or gun that were later found and asked to explain them. To the contrary, from all appearances, the men's denials were taken at face value. Only because respondent claimed he lived there (and

because he had exited the bedroom where the police found the weapons and narcotics) was he eventually arrested. But up to that point he, like the others, was a *detainee* not entitled to *Miranda* warnings.

The trial court did not make a finding that respondent had been arrested, only that he was not free to leave. This may have been factually correct, but it is not legally controlling. Certiorari should be granted.

II. To ratify *Pennsylvania v. Muniz*'s implicit holding that an arrestee may be asked questions which have an objectively permissible administrative or safety-related purpose, even if the responses will likely also be incriminating.

The question—"who lives here?"—when asked of a group of detainees during the execution of a narcotics search warrant, has valid safety and administrative purposes, and so is not an "interrogation" under *Miranda*, even if the police reasonably know that the response could be incriminating and even if the detainees are "in custody." As the *Miranda* Court itself stated, police may engage in "general on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process" without giving the prophylactic warnings. 384 U.S. at 477-478. "In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present." *Id.*

But even more specifically, this Court has already indicated—in *Pennsylvania v. Muniz*, 496 U.S. 582, 110 S.Ct. 2638 (1990)—that questions which prompt incriminating answers may still be asked pre-*Miranda* if they are reasonably related to

a proper administrative or safety purpose. In that case, Inocencio Muniz was arrested for drunk driving and transported to the police station. There, despite not being mirandized, he was asked his name, address, height, weight, eye color, date of birth, current age, and the date of his sixth birthday. *Id.* at 585-86. All nine justices apparently agreed that the questions were intended, at least from Muniz's point of view, to elicit an incriminating response. *Id.* at 601, 606-07, 609. (Clearly, Justice Brennan's plurality opinion says this, as does Justice Marshall's dissent; Chief Justice Rehnquist's concurrence assumes it.)

Nevertheless, eight of the nine held that Muniz's incriminating responses (all but the sixth-birthday answer) were admissible. Justice Brennan's plurality found a "booking exception" to *Miranda*, while Justice Rehnquist believed that the incriminating nature of Muniz's responses was not testimonial (he demonstrated his intoxication by slurring his words, not by the content of his responses) and therefore admissible. *Id.* (Granted, Justice Brennan also contradicted himself in the same paragraph, first stating that the routine booking questions were intended to elicit an incriminating response but were still admissible because subject to an exception, and then finding them permissible because they were asked for record-keeping purposes only.) Thus, although *Muniz* has no majority reasoning, it should stand for this proposition: that where the police ask questions for valid non-investigatory purposes, the questions fall outside *Miranda* even if the police also know that the questions are reasonably likely to elicit an incriminating response.

Additionally, when the police have arrested a suspect, they may also ask safety-related

questions—without first giving the *Miranda* warnings—even though the responses may incriminate. See *New York v. Quarles*, 467 U.S. 649, 656, 104 S.Ct. 2626, 2631-32 (1984). Thus, when the police reasonably believe that an arrestee has discarded a weapon, they may ask him where it is, even though a positive response will probably incriminate him. *Id.*

Here, asking "who lives here" was not an interrogation. Although whether respondent resided at the Hull address had some bearing on his criminal culpability, the question was asked of the group, for legitimate non-investigatory purposes. As Officer Gadwell indicated, it is helpful for police to know who else might be in the house, whether there are any animals present, and who to give the search warrant and return to. Thus, regardless what Gadwell's subjective intent was, this question objectively constitutes (a) a proper on-the-scene general question of citizens in the fact-finding process, (b) a proper "booking question" in the process of identifying the individuals present when the warrant was executed, and (c) a proper public safety question to protect the officers who were clearing the house. By simply being asked if he lived there, respondent was not being interrogated, and thus he was not entitled to *Miranda* warnings.

This Court should grant certiorari to better articulate this rule of law arising from *Muniz* and to correct the Michigan state courts' misapplication of it.

III. To correct the misunderstanding and misapplication of *Missouri v. Seibert*, and to clarify its 4-1-4 holding.

Even if respondent should have been mirandized before being asked where he lived, suppressing his voluntary statement, given *after* a proper reading and waiver of the rights, violated *Oregon v. Elstad*, 470 U.S. 298 (1985). *Elstad* authorizes the admission of a mirandized confession, even after the police initially fail to give the warnings and obtain an inculpatory statement. That is, the failure of officers to properly mirandize a suspect does not preclude admission of a later statement given after being apprised of those rights, unless officers (a) deliberately omitted giving the *Miranda* warnings in order to obtain an initial confession, (b) failed to take any corrective action to ensure that a reasonable person in the suspect's situation would understand the import and effect of the ensuing warnings, and then (c) used the informal statement as leverage in procuring a mirandized one. See *Missouri v. Seibert,* 542 U.S. 600, 124 S.Ct. 2601 (2004).

Here, Officer Gadwell did not intentionally omit Miranda when he asked who lives here. More importantly, once respondent was arrested, he was read his rights twice and stated that he understood them, and there is nothing in the record to suggest that these readings were rendered ineffectual simply because respondent had initially admitted that he resided at the drug house. Most tellingly, not only did Gadwell not use the informal admission as a fait accomplis to obtain respondent's formal statement that he lived there, but once he was read his rights, respondent admitted that some of the drugs were his. In other words, the formal statement did not relate

back to the un-mirandized one. Nevertheless, confusion over the reach of *Missouri v. Seibert* caused the Michigan state courts to erroneously suppress respondent's second statement. Both *Seibert* and *Elstad* require that the second statement be admitted.

In *Elstad*, the police arrested the defendant in his home and questioned him without *Miranda* warnings, and he admitted to participating in a robbery. 470 U.S. at 301. Elstad later gave a full confession at the police station after being mirandized. *Id.* at 301-02. Although the Court held that the first statement had to be suppressed, that did not prevent the introduction of the full confession. Only if the second statement had not been given knowingly and voluntarily would it be suppressed, but not on the basis of a failure to notify the defendant of his rights. *Id.* at 309. According to *Elstad*, where prior un-*Mirandized* custodial interrogation is not coercive, such questioning does not preclude the admission of a later mirandized statement. That is what happened here, and so the formal statement should have been admitted.

Judge Youngblood and the Michigan Court of Appeals seemed to believe, however, that *Missouri v. Seibert*, 542 U.S. 600, 124 S.Ct. 2601 (2004), rendered the mirandized confession inadmissible. This is wrong. In *Seibert*, the police arrested the defendant and took her to the police station. There, an officer questioned her for 30 to 40 minutes, intentionally withholding the *Miranda* warnings, while squeezing her arm and trying to make her feel guilty about the death she eventually admitted to causing. *Id.* at 604. After a brief break, the officer turned on a tape recorder, gave *Miranda*, and prompted Seibert to confess again. When she resisted, he reminded her that she had already told

him that the victim was supposed to die in his sleep. Seibert then formally admitted that she intended for the victim to die in the fire she had set. *Id.* at 605.

In a fractured opinion, this Court reversed. The four-justice plurality, led by Justice Souter, distinguished *Elstad* because, in Seibert's case, the initial police questioning was "systematic, exhaustive, and managed with psychological skill." *Id.* at 616. Moreover, the two statements totally overlapped in their content, were virtually continuous, and the interrogator even reminded Seibert during the second statement of what she had already confessed to in the first. In *Elstad*, on the other hand, given that the first confession occurred after only a short conversation at his home, a reasonable person could have seen the station house questioning as a new and distinct experience, and the *Miranda* warnings in that setting "could have made sense as presenting a genuine choice whether to follow up on the earlier admission." *Id.* at 615.

Justice Kennedy concurred that the mid-interrogation warning was insufficient, but rejected the plurality's test—whether the Miranda warnings delivered midstream could have been effective enough to accomplish their object—as too broad, given that it would apply even where the initial *Miranda* omission was unintentional. *Id.* at 621. Instead, Justice Kennedy indicated that post-*Miranda* statements may be excluded only when a *deliberate* two-step strategy was used *and* the postwarning statement is related to the substance of the prewarning statement, unless curative measures are taken before the postwarning statement is made. Thus, if *Miranda* was not deliberately omitted, if the second statement did not relate back to the first, or if curative measures were given to ensure that a reasonable person in the suspect's situation would

understand the import and effect of the *Miranda* warning (*id.* at 622), then the second statement would come in under Justice Kennedy's view. Because the police in *Seibert* acted intentionally, because the second statement totally related back to the first, and because any reasonable person would have questioned why *Miranda* was being given after they had just confessed, Justice Kennedy provided the fifth vote for reversal.

Under either analysis, however, respondent's formal statement here is admissible. The initial "interrogation"—a single question posed to a group of men, asked in respondent's living room—is about as far from a systematic, exhaustive, psychologically managed station-house interrogation as one can get. Additionally, there was a definite break between the two statements. When none of the other men claimed to live there, they were let go. Respondent was then formally arrested, taken to a different room, mirandized, and provided with a rights waiver form.

Further, respondent's second statement does not track the first at all. In fact, when asked formally what he was doing in the house, defendant did not say, "I live here" like he did when asked if anyone resided at the drug house. Instead, he said he was "chilling" and playing a game. Similarly, there is nothing to indicate that Gadwell reminded defendant of his earlier admission as a tactic in getting him to re-admit that he lived there or that the drugs were his. Clearly, as in *Elstad*, a reasonable person in respondent's shoes could have declined to talk pursuant to the subsequent warnings. Thus, even under Justice Souter's analysis, both Judge Youngblood and the Court of Appeals erred.

Under Justice Kennedy's view also, the second statement should not have been excluded. Even if, as

both courts below found, Gadwell's approach was disingenuous, the second statement did not relate back to the first and is thus admissible. This is especially true of the portion of the second statement where defendant admits he had some weed and ran because he was scared. Nothing of the sort was said in the initial conversation. Finally, even if the second statement did relate back to the first, the procedure Officer Gadwell followed would have demonstrated to a reasonable person in the suspect's situation that he did not have to speak. In fact, it had that very effect on respondent, because he ended the interview by stating that he no longer wished to say anything. There can hardly be more convincing evidence that a suspect was informed of, understands, and is able to exercise his rights than when he actually does so. This Court should grant certiorari not only to correct the mis-application of *Siebert*, but to clarify the holding of that case.

Here, defendant understood his rights and effectively waived them. He was given the *Miranda* warnings three times—once orally in the hallway, a second time when he personally read the advice of rights form out loud, and a third time during the completion of the Interrogation Record. Not only that, but the first interrogation question was whether he understood his rights, to which he answered, "yes." (EH, 31-32). He has never even claimed that he did not understand that he had the right to remain silent, the right to a lawyer, et cetera, or that he did not waive those rights.

Finally, contrary to Judge Youngblood's contention, defendant's confession is not rendered inadmissible simply because he refused to sign it or the waiver form, or because he may not have said "I hereby waive my rights." This Court has held that a defendant's refusal to sign a waiver form does not

mean that he did not properly waive his rights. See *North Carolina v. Butler*, 441 U.S. 369, 99 S.Ct. 1755 (1979). As Officer Gadwell testified, it is common for a suspect to willingly give a statement while refusing to sign any paperwork. Similarly, there are no magic words a suspect must recite before he can validly waive the rights enumerated by the *Miranda* warnings. To the contrary, a defendant may be *silent* as to whether he waives his rights, but as long as he understands them and engages in a course of conduct implicitly indicating waiver, then a court may properly conclude that the defendant has effectuated a waiver. *Id.* at 373, 1757. That is what happened here.

Conclusion

The federal courts seem confused about the extent to which a person detained under circumstances similar to those in *Terry*—such as during the execution of a search warrant—may be questioned without *Miranda* warnings. Cf. *U.S. v. Kim*, 292 F.3d 969, 976 (CA9 2002) (*Summers* detainee would be entitled to warnings); and *U.S. v. Davis*, 530 F.3d 1069, 1081-82 (CA9 2008) (proper to ask *Summers* detainee about drugs on premises, without warnings). Correspondingly, there is a difference of opinion as to whether an "arrest" under the Fourth Amendment is an "arrest" under the Fifth. Cf. *U.S. v. Bennett*, 329 F.3d 769, 774 (CA10 2003) (same test); with *U.S. v. Newton*, 369 F.3d 659, 673 (CA2 2004) (not same test). Apart from that, some courts persist in applying a "free to leave" standard to the "in-custody" question even after this Court has said that a detainee who is not free to leave still may not be in custody for *Miranda*

purposes. See *Kim*, *supra*, at 973-74; *U.S. v. Thompson*, 496 F.3d 807, 810-11 (CA7 2007); *U.S. v. Craighead*, 539 F.3d 1073, 1082 (CA9 2008). Moreover, even under the correct legal framework, courts cannot agree about what factors to use in deciding what constitutes the equivalent of formal arrest. See *U.S. v. Mittel-Carey*, 493 F.3d 36 (CA1 2007) (unfamiliar surroundings, many officers at the scene, physical restraint, and prolonged or intense interrogation); *Thompson*, *supra* (isolation, police show of force, detainee not told he was not under arrest).

Along these lines is this unresolved inquiry: what is the relationship, if any, between a subject's physical constraints and the type of questioning put to him? In other words, can the length and manner of the interrogation determine whether a person is "in custody," or do those factors matter only in deciding whether he has been "interrogated"? And even if a subject has been interrogated without *Miranda*, does *Muniz* allow his inculpatory answers to be admitted if the questions had valid non-investigatory purposes? It is evident from experience, and from the volume of cases in this area, that these questions arise frequently for law-enforcement officers and, subsequently, for courts. They deserve to be addressed by this Court.

Finally, as this case amply demonstrates, the tension between this Court's holdings in *Elstad* and *Seibert*, and the lack of a majority position in the latter case, have created an uncertain legal framework whenever the police initially fail to mirandize a suspect. Without a settled precedent, courts are left on their own to determine whether a subsequent statement is never, sometimes, or almost always admissible, and on what basis. As in

respondent's case, what results is an outcome-driven approach that is inconsistent with the rule of law. The test of admissibility in this area needs to be better refined and articulated.

For these reasons, this Court should grant certiorari.

RELIEF

Wherefore, the Petitioner requests that certiorari be granted.

Respectfully submitted,

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research,
Training and Appeals
1441 St. Antoine
Detroit, MI 48226
313 224-5792

DAVID A. McCREEDY (P56540)
Assistant Prosecuting Attorney
1441 St. Antoine, 11th Floor
Detroit, Michigan 48226
(313) 224-3836

Appendix A: Court of Appeals Opinion

COURT OF APPEALS OF MICHIGAN

PEOPLE of the State of Michigan,

Plaintiff-Appellant,

v.

Raymond Desha DAVIS,

Defendant-Appellee.

Docket No. 282886.

Dec. 18, 2008.

Wayne Circuit Court; LC No. 06-014376-01.

Before: BORRELLO, P.J., and DAVIS and GLEICHER, JJ.

PER CURIAM.

The prosecution appeals as on leave granted the trial court's order granting defendant's motion to suppress.[1] We affirm.

---

[1]This Court initially denied leave "for failure to persuade the Court of the need for immediate appellate review." *People v Davis*, unpublished order of the Court of Appeals, entered February 22, 2008 (Docket No. 282886). The prosecution applied for leave to appeal with our Supreme Court. In lieu of granting leave to appeal, our Supreme Court remanded this matter "for consideration as on leave

At issue are two statements defendant gave to police during a police raid on a residence in Detroit where the police were executing a search warrant. At the commencement of the raid, defendant jumped out of a back window and attempted to run away, only to be stopped and brought back into the house by an officer outside. Narcotics and firearms were found in the house. Defendant was placed in handcuffs, as were the three other people found in the house. Detroit Police Officer Robert Gadwell began obtaining the detainees' "names, birth dates, addresses" and social security numbers pursuant to "standard procedure," and he also asked the group "who lives here." Defendant volunteered that he did. After the residence was "cleared" by the officers, the three other detainees were issued "tickets" and released; defendant was placed under arrest. Defendant was then given his *Miranda*[2] warnings, which he indicated that he understood, and again asked various questions, including whether he lived at the residence. Defendant again stated that he did, and he furthermore explained that he ran from the police because he "had some weed and [he] was scared." The interview stopped when defendant stated that he "d[id]n't want to say anything" in response to an inquiry into what he planned to do with the marijuana.

The trial court held an evidentiary hearing regarding whether to suppress defendant's statements. The only individual to testify at the

---

granted." *People v Davis*, 481 Mich 888; 749 NW2d 740 (2008).

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

hearing was Officer Gadwell, but the trial court also considered the transcript from defendant's preliminary examination. The trial court held that defendant was in custody at all relevant times, so all of defendant's statements were in response to custodial interrogation. The trial court further found that an experienced narcotics officer would understand asking "who lives here" to be reasonably calculated to evoke an incriminating response for the purpose of establishing constructive possession, and it was "preposterous" to suggest otherwise. Therefore, it found that defendant's pre-*Miranda* response was inadmissible. The trial court further found Officer Gadwell to lack credibility when testimony from other officers at the preliminary investigation were considered, and it found that Officer Gadwell's reading of defendant's *Miranda* rights, followed by asking him again whether he lived here, constituted an impermissible attempt to retroactively "launder" an inadmissible statement. The trial court finally held that defendant's statement that he had weed was inadmissible because the prosecution failed to establish that defendant waived his rights.

We review a trial court's conclusions of law and application of the law to the facts regarding its decision to suppress a confession de novo, *People v McBride*, 273 Mich App 238, 249; 729 NW2d 551 (2006), rev'd in part on other grounds 480 Mich 1047 (2008), while reviewing its factual findings for clear error, *id.* A finding of fact is clearly erroneous if, after a review of the entire record, we are left with a definite and firm conviction that a mistake was made. *Id.*

Generally, a defendant's statements made during a "custodial interrogation" may not be

introduced into evidence unless the prosecution demonstrates that, prior to any questioning, the accused was read his *Miranda* rights, and voluntarily, knowingly and intelligently waived those rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). An accused is considered to be in "custody" if he could reasonably believe that he was not free to leave. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). The evidence established that, after defendant jumped out of a window and attempted to flee, he was brought back by police officers, handcuffed, and informed that he was being detained before he made his first statement. We conclude that, even though defendant was not formally under arrest until his later statements, he could reasonably have believed he was not free to leave. The trial court did not commit clear error in finding that defendant was in "custody" when he made his first challenged statement. *Zahn, supra* at 449.

Police conduct constitutes "interrogation" when the police knew or reasonably should have known that their conduct was likely to invoke an incriminating response. *People v Anderson*, 209 Mich App 527, 532-533; 531 NW2d 780 (1995). Conversely, "general on-the-scene questions" or "routine booking questions," such as asking for an individual's identity or address, are not always "designed to elicit incriminatory admissions," and thus, are not always considered "interrogation." See *Pennsylvania v Muniz*, 496 US 582, 600-602; 110 S Ct 2638; 110 L Ed 2d 528 (1990); *People v Ish*, 252 Mich App 115, 118; 652 NW2d 257 (2002).

Officer Gadwell testified that his questioning was purely administrative. However, we defer to the

trial court's assessment of a witness's credibility, and the trial court found Officer Gadwell not credible. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). In addition, (1) the police were executing a search warrant for illegal narcotics, (2) defendant had just been detained after attempting to flee the residence, and (3) one of the two reasons given for defendant's subsequent arrest was because he admitted that he resided at the residence. We do not find that the trial court clearly erred in concluding, on the basis of the above circumstances, that Gadwell either knew or should have known that his question was likely to invoke an incriminating response, and thus, constituted "interrogation," *Anderson, supra* at 532-533. Accordingly, the trial court did not err when it granted defendant's motion to suppress his pre-*Miranda* statement. *Miranda, supra* at 444.

Defendant's second set of statements is a closer question. Defendant was unambiguously in custody at the time. Officer Gadwell testified that defendant was advised of his *Miranda* rights and that, although he refused to sign or write anything, defendant indicated that he understood those rights. Nevertheless, suppression is warranted if there is a "causal connection" between the first, improper statements and the subsequent statements given after a defendant is advised of his rights. See *People v Coomer*, 245 Mich App 206, 222; 627 NW2d 612 (2001). Defendant was arrested shortly after, and in part because of, defendant's statement that he lived at the residence; his second questioning occurred shortly after his arrest. We find that there was at least some causal connection between the two sets of statements.

Furthermore, we must again defer to the trial court's assessment of the credibility of witnesses before it. Where prior un-*Mirandized* custodial interrogation is not coercive, such questioning does not preclude the admission of a post-*Miranda* statement. *Oregon v Elstad*, 470 US 298, 308, 310-318; 105 S Ct 1285; 84 L Ed 2d 222 (1985). At the other extreme, a plurality[3] of the United States Supreme Court held that deliberately withholding *Miranda* warnings in order to obtain an unwarned confession for later use in obtaining the same information after giving warnings renders the subsequent statements inadmissible. *Missouri v Seibert*, 542 US 600, 600-602; 124 S Ct 2601; 159 L Ed 2d 643 (2004). The trial court's findings reflect a factual scenario somewhere in between, where Officer Gadwell's two-stage interview may not have been "systematic, exhaustive, and managed with psychological skill," *Seibert*, but it was, at a minimum, disingenuous.

When we consider the trial court's credibility assessment in conjunction with the causal connection between defendant's unwarned statement and his subsequent statements, and the fact that we "presume that a defendant did not waive his rights" unless the prosecution shows otherwise, *North Carolina v Butler*, 441 US 369, 373; 99 S Ct 1755; 60 L Ed 2d 286 (1979), we are not left with a definite and firm conviction that the trial court made a

---

[3]A "plurality opinion of the Supreme Court, in which the reasoning is not supported by a majority of the justices, is not binding on this Court." *Jackson Drain Com'r v Village ofStockbridge*, 270 Mich App 273, 285; 717 NW2d 391 (2006).

mistake. We are therefore unable to find that the trial court erred in suppressing defendant's post-arrest statements.

Affirmed.

/s/ Stephen L. Borrello /s/ Alton T. Davis /s/ Elizabeth L. Gleicher

Appendix B: Order Denying Leave

Supreme Court of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellant,
v.
Raymond Desha DAVIS, Defendant-Appellee.

Docket No. 138225.
COA No. 282886.

May 1, 2009.

Order

On order of the Court, the application for leave to appeal the December 18, 2008 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

MARKMAN, J. (*dissenting*).

Defendant was charged with possession of ecstasy, being a felon in possession of a firearm, possession with intent to deliver marijuana, and possession of a firearm during the commission of a felony. The trial court suppressed evidence of defendant's incriminating statement to the police on the ground that he was interrogated without first being advised of his *Miranda* rights after he was arrested, *Miranda v Arizona,* 384 US 436 (1966). The Court of Appeals affirmed. *People v Davis,* unpublished opinion per curiam of the Court of Appeals, issued December 18, 2008 (Docket No. 282886).

While the police were executing a search warrant at a house, defendant jumped out of a bedroom window. He was brought back into the house and asked whether he lived there. Defendant indicated that he was living at the house. After narcotics were found in the house, defendant was arrested and advised of his *Miranda* rights. Defendant again indicated that he lived at the house.

A defendant must be made aware of his *Miranda* rights prior to a custodial interrogation. A "custodial interrogation" is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Yarborough v Alvarado*, 541 US 652, 661 (2004). "[C]ustody must be determined based on how a reasonable person in the suspect's situation would perceive his circumstances." *Id.* at 662. I agree with the trial court that defendant was in custody. He tried to leave the house, the police prevented him from doing so, brought him back into the house, and handcuffed him. A reasonable person in defendant's situation would have believed himself to have been in custody.

I also agree with the trial court that defendant was subjected to interrogation. "[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v Innis*, 446 US 291, 301 (1980). Here, the police asked defendant if he lived at the house that they had reason to believe contained drugs. Thus, they should have known that they were likely to elicit an incriminating response. Accordingly, the statement made before

defendant was advised of his *Miranda* rights was made during a custodial interrogation, and, thus, would seem to be inadmissible.

The more difficult issue here is whether the *subsequent* statement made *after* defendant was advised of his *Miranda* rights is also inadmissible. In *Missouri v Seibert,* 542 US 600 (2004) (a plurality opinion), the United States Supreme Court held that the police cannot deliberately wait to advise a defendant of his *Miranda* rights until after a station-house interrogation produces a confession and then admit the statement made after *Miranda* rights are given. However, the *Seibert* Court also held that *Oregon v Elstad,* 470 US 298 (1985), remained good law. In *Elstad,* the Court held that if the failure to warn before the initial statement constituted an oversight, and the initial statement was made at the suspect's home and the subsequent statement was made after the suspect was advised of his rights and after a station-house interrogation, the subsequent statement is admissible because "any causal connection between the first and second responses to the police was 'speculative and attenuated.'" *Seibert,* 542 US at 615, quoting *Elstad,* 470 US at 313. The pertinent question is "[c]ould the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture?" *Seibert,* 452 US at 612. "Could they reasonably convey that he could choose to stop talking even if he had talked earlier?" *Id.* The Court articulated several factors to evaluate when determining whether "*Miranda* warnings delivered midstream could be effective enough to accomplish their objective: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police

personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." *Id.* at 615.

This case is similar to *Elstad* in several important respects—the failure to advise defendant of his *Miranda* rights appears to have been an oversight and the custodial interrogation was not carried out in a station-house environment. However, in other respects, this case is similar to *Seibert*—the questions and answers were the same on two occasions and they occurred relatively closely in time. I would grant leave to appeal.

CORRIGAN, J., joins the statement of MARKMAN, J., and additionally states as follows:

I join Justice Markman's statement insofar as he sees a jurisprudentially significant issue in defendant's post-*Miranda*[1] statement. I would additionally grant leave to appeal on the issue whether the police officer's questions regarding defendant's address truly constituted custodial interrogation under *Rhode Island v Innis,* 446 US 291 (1980), or amounted to routine booking questions.

YOUNG, J., joins the statement of MARKMAN, J.

---

[1] *Miranda v Arizona,* 384 US 436 (1966).

(2)

Supreme Court, U.S.
FILED
AUG 25 2009
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2008
NO. 09-100

THE PEOPLE OF THE STATE OF MICHIGAN
Petitioner

vs.

RAYMOND DESHA DAVIS
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SHELDON HALPERN* (P14560)
Attorney for Respondent
26339 Woodward Avenue
Huntington Woods, MI 48070
(248) 554-0400

***Attorney of Record**

COUNTER-STATEMENT OF THE QUESTIONS

Petitioner raised three questions in the Petition for Writ of Certiorari. The questions may be differently asked as follows:

I.

Must *Miranda* warnings be given before a person seized during the execution of a search warrant for drugs is interrogated concerning residency in that premises?

II.

Where the trial court judge reasonably found the police officer's testimony not credible, and the Michigan state courts correctly followed United States Supreme Court precedent, and there was no valid waiver of the Respondent's Fifth Amendment protections, were statements made following a custodial interrogation -- without recitation of the Miranda rights -- properly suppressed?

III.

Missouri v. Seibert prohibits an 'end-run' around a suspect's Fifth Amendment rights where that individual is subject to a custodial interrogation. Does Seibert require suppression of the subsequent statement, where there was continuity of time, place, and participants and there was no attenuation of the primary taint?

TABLE OF CONTENTS

Counter-statement of the Questions 1

Table of Contents 2

Table of Authorities 3

Opposition to Petition for Writ of Certiorari 5

Statement of Jurisdiction 6

Constitutional Provisions Involved 6

Statement of Material Facts 7

Opposition to Reasons for Granting the Writ 11

Conclusion 22

Relief 23

TABLE OF AUTHORITIES

Berkemer v. McCarty, 468 U.S. 420,
104 S. Ct. 3138 (1984) 18

Brown v. Illinois, 422 U.S. 590,
95 S. Ct. 2254 (1975) 19, 20

California v. Beheler, 463 U.S. 1121,
103 S. Ct. 3517 (1983) 16

Colorado v. Connelly, 479 U.S. 157,
107 S. Ct. 515 (1986) 11

Dunaway v. New York, 442 U.S. 200,
99 S. Ct. 2248 (1979) ..... passim

Michigan v. Summers, 452 U.S. 692,
101 S. Ct. 2587 (1981) 17, 18, 22

Miranda v. Arizona, 384 U.S. 436,
86 S. Ct. 1602 (1966) 11, 22

Missouri v. Seibert, 542 U.S. 600,
124 S. Ct. 2601 (2004) 11, 20, 21, 22

Moran v. Burbine, 475 U.S. 412,
106 S. Ct. 1135 (1986) 11

Oregon v. Elstad, 470 U.S. 298,
105 S. Ct. 1285 (1985) 20, 21

Oregon v. Mathiason, 429 U.S. 472,
97 S. Ct. 711 (1971) 17

Pennsylvania v. Muniz, 496 U.S. 582,
110 S. Ct. 2638 (1990) ..... passim

Rhode Island v. Innis, 446 U.S. 291,
100 S. Ct. 1682 (1980) 12,15

Taylor v. Alabama, 457 U.S. 687,
102 S. Ct. 2664 (1982) 19

Wong Sun v. United States, 371 U.S. 471,
83 S. Ct. 407 (1963) 14,19

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2008

THE PEOPLE OF THE STATE OF MICHIGAN
Petitioner

vs.

RAYMOND DESHA DAVIS
Respondent

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NOW COMES Raymond Desha Davis, by and through his attorney, Sheldon Halpern, and prays this Honorable Court deny the Petition for Writ of Certiorari.

OPINIONS BELOW

The Michigan Court of Appeals opinion and the Michigan Supreme Court order are attached to Petitioner's petition as Appendices A and B, respectively, and are incorporated herein by reference.

STATEMENT OF JURISDICTION

Petitioner's petition for writ of certiorari was filed pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Fifth Amendment, reads in relevant part:

No person shall be ... compelled in a criminal case to be a witness against himself ...

The United States Constitution, Fourteenth Amendment, reads in relevant part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law....

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Detroit police officers executed a search warrant in a narcotics raid at a house at 20416 Hull Street in Detroit on September 13, 2006. When several officers entered the house Mr. Davis left through a bedroom window; he was seized in the yard and taken back inside. Several other people who had been present were already secured and handcuffed; Mr. Davis was similarly handcuffed and placed with the others. The searching officers found illegal drugs and two firearms inside the home; some of the drugs were in plain-view in the bedroom, the window of which Mr. Davis exited as the officers entered (Preliminary examination transcript, 12/13/2006, pp. 26, 27, 29.

Officer Robert Gadwell assisted with detaining those present (*Id.* at p. 34). Gadwell said that he obtained some basic information from those present, and that "Mr. Davis in particular told [him] that he was living at that location at the time" (*Id.* at p. 35). Gadwell said that after one of the officers found narcotics in the house Gadwell arrested Mr. Davis and recited the *Miranda* warnings. Gadwell said he then obtained some basic information from Mr. Davis, and that Davis, after initially talking with the officer, did not waive his rights and refused to sign any statement; Davis terminated the interview (*Id.* at p. 37).

When Gadwell was asked by the prosecutor if he did anything further after he took the statement from Mr. Davis [prior to it being terminated by Mr. Davis], Gadwell replied "The only other thing I did in regard to that was take his personal information in which he stated - - he give (sic) me that address as his address. He stated he lived there for three weeks" (*Id.* at p. 40).

Gadwell said that residency questions are asked during raids to determine the presence of other people in the dwelling, or the presence of animals (Evidentiary hearing transcript ("HT"), 11/09/2007, p. 12). Additionally, he said, they like to know if the people present are supposed to be there at the location, and, "a lot of times," the officers need to know who the tax owner is or something" (*Id.* at p. 13). When asked if it was something significant to determine who was the resident of the house, Gadwell testified that "no," it was not (*Id.* at p. 38). The legal owner is not necessarily significant, Gadwell said, but he does like to know who that person is (Id. at pp. 45-46). When asked whether or not finding out the identity of the owner/resident is something that can be used to connect the person to drugs, or that pertains to a case, Gadwell replied "sometimes," but "not always' (*Id.* at pp. 47, 53).

Wayne County Circuit Court Judge Carole Youngblood found that Officer Gadwell was not credible in his testimony concerning several key points. For example, Gadwell maintained that the question of residence had nothing to do with the elements of the crimes, *i.e.,* narcotic and firearm possession offenses, underlying the search warrant executed on that day. The Circuit Judge observed that "It is less than genuine, and actually preposterous, to then opine that the issue of who lives in the house is not relevant to who is charged with possession" (*Opinion and Order Granting Defendant's Motion to Suppress Statements* ("Opinion"), dated December 14, 2007, p. 7; HT, p. 38). Indeed, Officer Gadwell said that Mr. Davis was arrested because of the statement and the observations by other officers that Davis had jumped out of the bedroom window (HT, p. 48). As correctly noted by Judge Youngblood, the "sole purpose of the question is to evoke an incriminating response to support constructive rather than actual possession" (Opinion, p. 7). Also, Gadwell's stated

reason for questioning about residence, i.e., to determine during the securing of the premises of anyone else or dogs were present, was not credible, for when Gadwell first asked the question the house had already been secured (*Id.* at p. 7, recounting the testimony of two other officers of the raid team that Mr. Davis was only taken back into the house *after* the house had been secured).

Judge Youngblood further found that Davis was not free to leave and was in custody at the time of Gadwell's questioning, designed to elicit an incriminating response, and a recitation of *Miranda* rights was therefore necessary. Judge Youngblood found that the taint from that first statement continued through the second, post-*Miranda* elicitation. Further, the Judge found no evidence that Mr. Davis voluntarily waived his constitutional rights; that is, the People failed in their burden of proof (Opinion, pp. 8-11).

Gadwell was asked several times if Davis was asked if he wanted to answer questions, and whether or not Davis had waived his rights to remain silent and to counsel; Gadwell *never* gave an affirmative answer. Instead, his response was that the officer just "continued to talk to him" (HT, p. 11).

The Michigan Court of Appeals afforded Judge Youngblood proper deference in witness credibility, and also held that Mr. Davis was in custody -- although not formally under arrest -- when he was seized outside, brought back inside and handcuffed, and that the subsequent questioning by Gadwell, likely to elicit an incriminating response, was interrogation necessitating *Miranda* warnings *(People v Davis*, unpublished per curiam opinion of the Court of Appeals, decided December 18, 2008 (Docket No. 282886), pp. 2-3) [the opinion is Appendix A in Petitioner's petition, and is incorporated herein by reference]. The Michigan Court of Appeals also noted that the police were in the process of executing a search warrant for illegal narcotics, Davis had

been detained while trying to flee the premises, and his pre-*Miranda* statement about living at the residence was one of the two reasons given by Officer Gadwell for making the arrest (*Id.* at p. 3).

The Michigan Supreme Court denied leave to appeal on May 1, 2009 (the order denying leave to appeal is Appendix B to Petitioner's petition, and is incorporated herein by reference).

OPPOSITION TO REASONS FOR GRANTING THE WRIT

Petitioner raised three bases for granting the writ: 1) to clarify that Summers detainees are not entitled to *Miranda* warnings; 2) to ratify an "implicit holding" in *Pennsylvania v. Muniz;* and 3) to correct a "misunderstanding and misapplication" of *Missouri v. Seibert.* None of the reasons merit granting the writ.

The prosecution bears the burden of establishing that a purported waiver of a suspect's Fifth Amendment rights to counsel and to remain silent was voluntarily made. *Colorado v. Connelly*, 479 U.S. 157, 168, 170, 107 S. Ct. 515 (1986)(in order to be valid, a waiver must be voluntarily made and must be the product of a "free and deliberate choice, rather than [as a result of] intimidation, coercion or deception"); *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602 (1966). A two-part inquiry determines whether a valid waiver has occurred: First, the relinquishment of the right "must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. *Moran v. Burbine,* 475 U.S. 412, 421, 106 S. Ct. 1135 (1986).

Petitioner has never established a valid waiver of rights. The Circuit Judge properly found that the prosecution failed to meet its burden; that is, no credible evidence was presented to establish that Davis waived his constitutional protections (Opinion, p. 11). Further, the Court noted that even were Officer Gadwell's testimony to be believed it would establish only that Mr. Davis was *subsequently* advised of his *Miranda* rights, but it would not establish any waiver of those rights (*Id.*).

In *Pennsylvania v. Muniz,* 496 U.S. 582, 110 S. Ct. 2638 (1990), this Court held that the *Miranda* protections apply where the police expressly question a suspect, or where there is the "functional equivalent" of express questioning; that includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." See, also, *Rhode Island v. Innis,* 446 U.S. 291, 302, 100 S. Ct. 1682 (1980). In *Muniz*, the Court examined a factual situation where a drunk-driving suspect was being booked at the police station and was asked eight questions; the booking process was videotaped. The suspect was asked his name, address, height, weight, eye color, date of birth, current age, and the date of his sixth birthday. The last question, which the suspect could not answer in his condition, was determined to be testimonial, and the Court ruled that it should be suppressed. The first seven questions, however, were administrative in nature and were not designed to elicit an incriminating response.

In the instant case, Davis was charged with possessing the drugs and guns found inside the particular dwelling. The officer twice asked for, in the course of the raid, Mr. Davis' address; the first instance preceded any *Miranda* warnings; the second was after Mr. Davis terminated the interview and while the interrogation record was prepared. The questions were manifestly designed to elicit an incriminating response

directly related to the drugs found on that premises during the execution of the drug-related search warrant. Gadwell knew that an answer to his question of 'who lives here,' *in the context of a drug raid,* was obviously and "reasonably likely to elicit an incriminating response from the suspect." *Muniz, supra.* The *Muniz* decision made clear that "in order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." 496 U.S. at 594. Gadwell's testimony at the hearing suggesting that the questioning of Mr. Davis about residency was merely incidental, almost collateral, and essentially an administrative procedure, to the reason why the officers were present at 20416 Hull, was incredible.

Officer Gadwell also said that an interrogation record "has nothing to do with the case and the crime" (HT, p. 36). In some other case that may be true. However, in the context of a drug-raid, generally, and this case, specifically, where the officers already have probable cause to believe a possession crime has been or is being committed, the elicitation through interrogation of information directly relevant to an element of that criminal charge requires suppression of the evidence obtained in contravention of the suspect's constitutional protections. *Dunaway v. New York, 442 U.S. 200, 99 S. Ct. 2248 (1979); Wong Sun v. United States,* 371 U.S. 471, 83 S. Ct. 407 (1963).

The statements attributed to Mr. Davis were communications which explicitly or implicitly related factual assertions; that is, they were testimonial. Mr. Davis' situation was not merely one of relating personal data during the booking process after an arrest, as in *Muniz*, but was responsive to the interrogation of the officer to elicit the information needed by the officer to obtain the probable cause to make the arrest. Without the residency answer Mr. Davis would not have been arrested for the possession offenses. The *Muniz* majority, in any event, rejected an argument that the

booking questions asked of Muniz (name, address, height, weight, eye color, et cetera) did not constitute custodial interrogation. The Court stated it disagreed:

> " ... with the Commonwealth's contention that Officer Hosterman's first seven questions regarding Muniz's name, address, height, weight, eye color, date of birth, and current age do not qualify as custodial interrogation as we defined the term in *Innis, supra,* merely because the questions were not intended to elicit information for investigatory purposes. As explained above, the *Innis* test focuses primarily upon "the perspective of the suspect." *Muniz*, supra, 496 U.S. at 601.

It is common knowledge that police seek indicia of residency in the execution of drug-related search warrants. Such indicia go directly to an element of the offense, *i.e.,* the individual's possession, actual or constructive, of the contraband. When police execute a search warrant there has already been a determination of probable cause and the officers are then expressly searching for specific and identified contraband and other incriminating evidence. This is not a case where an officer happens upon some event and merely asks 'what happened.' Instead, after Mr. Davis was brought back inside, handcuffed and seated with the other occupants, they were asked who lived there, a question manifestly designed to secure the proof necessary to legitimize an arrest. It was not a booking or administrative process; rather, the question was tantamount to asking 'whose drugs are these?', a testimonial question designed to elicit incriminating information and prohibited by *Innis.* See, also, *Dunaway, supra,* wherein this Court held that where the defendant had been picked-up for questioning on the basis of a tip and taken in for questioning, and although not told that he was under arrest he nevertheless would not have been free to leave, the resulting incriminating statements had to be suppressed.

The *Dunaway* Court also stated that:

> "[T]he application of the Fourth Amendment's requirement of probable cause does not depend on whether an intrusion of this magnitude is termed an "arrest" under state law. The mere facts that petitioner was not told he was under arrest, was not "booked," and would not have had an arrest record if the interrogation had proved fruitless, while not insignificant for all purposes, obviously do not make petitioner's seizure even roughly analogous to the narrowly defined intrusions involved in Terry and its progeny. Indeed, any "exception" that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are "reasonable" only if based on probable cause" 442 U.S. at 212 (Internal citations omitted).

In contrast, in *California v. Beheler,* 463 U.S. 1121, 103 S. Ct. 3517 (1983), the third case Petitioner contends requires clarification (Petition for Writ of Certiorari ("Petition"), p. 13), the suspect had voluntarily accompanied police to the station and gave a voluntary interview. This Court, noting that Beheler had not been taken into custody or otherwise deprived of his liberty, held *Miranda* warnings were not required, although the questioning occurred in the 'coercive environment' of a police station. 463 U.S. 1124-1125, and citing *Oregon v. Mathiason,* 429 U.S. 472, 97 S. Ct. 711 (1971).

Mr. Davis, clearly, was not free to leave. In fact, according to testimony of officers Mr. Davis tried to leave upon the officers' arrival, but was seized, moved back inside,

handcuffed, and then questioned. His case is analogous in relevant part to that in *Dunaway.*

In the case of *Michigan v. Summers,* 452 U.S. 692, 101 S. Ct. 2587 (1981), the Court upheld the search, where, during the execution of a search warrant at the defendant's home, the defendant was taken back into the house from an outside porch, was subsequently searched and the narcotics were found in his coat. Summers addressed the Fourth Amendment implications underlying the seizure and detention; that is, the issue involved "only the constitutionality of a pre-arrest "seizure." 452 U.S. 696. The Court also held that "Furthermore, the type of detention imposed here is not likely to be exploited by the officer or unduly prolonged in order to gain more information, *because the information the officers seek normally will be obtained through the search, and not through the detention."* 452 U.S. at 701 (emphasis supplied). Accordingly, the Court held that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain occupants of the premises while a proper search is conducted." 453 U.S. at 705.

In the case at issue the officers, in contravention of Mr. Davis' Fifth Amendment constitutional right against self-incrimination, exploited the un-*Mirandized* interrogation to obtain the two statements at issue. The officers did not merely detain the people while the search for physical evidence was conducted. The occupants were seized, handcuffed, *and* interrogated. Mr. Davis was arrested as a direct result of the incriminating answer he gave in response to Officer Gadwell's interrogation. Contrary to Petitioner's assertion that "Respondent here was merely detained, with others, in the living room of his own house" (Petition, p. 14), there was no evidence as to the identity of the property owner. Gadwell admitted that he never even looked at Davis' driver's license (HT, pp. 41, 43-45). In the second round of questioning

Gadwell elicited from Mr. Davis that he had been living at the house for several weeks (Id. at 64-65). *Summers* requires no clarification of the type requested by Petitioner, and the instant facts do not justify issuance of the writ.

Additionally, the instant case is distinguishable from *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138 (1984), cited by Petitioner. *Berkemer* addressed a traffic stop detention (itself a significantly distinguishing fact), and the case provides no substantive support for Petitioner's argument. The *Berkemer* Court upheld the search in large part because of the brief and public nature of the detention, and for the reason that there usually are fewer officers present during a traffic stop than might be found in a police station. Overall, the atmosphere surrounding the brief traffic encounter is thus seen as not so coercive as to render it unreasonable. In contrast, however, the instant case involves, as Judge Youngblood correctly found, "an interrogation in an extremely coercive police environment with *at least six police officers present in the house*" (Opinion, p. 8) (emphasis supplied).

There was no intervening event, other than the giving of *Miranda* rights, between the initial illegal interrogation about the residence and the subsequent statements at issue. The events were close in time and place. The illegality thus was not adequately attenuated so as to render the subsequently-obtained statements admissible. *Brown v. Illinois*, 422 U.S. 590, 602-603, 95 S. Ct. 2254 (1975) ("Miranda warnings do not cure an illegal arrest, and do not in and of themselves break the causal link"). As *Brown* also stated, "In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, Wong Sun requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be "sufficiently an act of free will to purge the primary taint" (*Id.* at 602).

The burden is on the government to prove there was no causal connection between the evidence sought to be admitted and the illegality. *Taylor v. Alabama,* 457 U.S. 687, 689-690, 102 S. Ct. 2664 (1982); *Dunaway, supra,* 442 U.S. at 217, 218 (even if a defendant makes a voluntary statement after an illegal arrest the taint is not necessarily attenuated; the voluntariness for the 5th Amendment analysis is a threshold for 4th Amendment analysis). Subsequent compliance with the mandates of the Fifth Amendment, therefore, does not necessarily validate the incriminating statements obtained. Dunaway, 442 U.S. at 217; Brown, 422 U.S. at 602-603.

The case of *Missouri v. Seibert,* 542 U.S. 600, 124 S. Ct. 2601 (2004), is helpful by analogy. In the plurality decision the Court expressly noted that a "midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with *Miranda's* constitutional requirement ... [and] is inadmissible." Additionally, the Court observed that "By any objective measure, the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, *close in time and similar in content.* After all, the reason that question-first is catching on is as obvious as its manifest purpose, which is to get a confession the suspect would not make if he understood his rights at the outset..." (emphasis supplied).

The Court further expressly noted that the police tactics there used distinguished it from *Oregon v. Elstad,* 470 U.S. 298, 105 S. Ct. 1285 (1985), which allowed as admissible a second, *Mirandized* statement taken after a prior questioning without warnings, by noting that the police in Seibert sought an end-run around Miranda. In Seibert there was initial questioning during which incriminating statements were obtained, then there was a break of fifteen to twenty minutes, then the questioning resumed with warnings in the

same physical place as had the unwarned segment, and there was a continuity of officers. Additionally, "in particular, the police did not advise that her prior statement could not be used," and the police fostered the impression that the second series of questions was a *continuation of the first* (emphasis supplied). The Court concluded that because the warnings were inadequate, there was "no need to assess the actual voluntariness of the statement." *Id.* at Fn 8.

In *Elstad,* the second-round of questioning occurred later at a police station and was thus a new interrogation; the taint from the earlier interrogation was attenuated. In the instant case, there was no break in the events; the officer not only commenced the interrogation in the same house in a short period of time, but, more coercively, perhaps, moved Mr. Davis for the second round of interrogation into the very room where the drugs were found. There was a continuity of time, place, and participants. The taint was not attenuated and *Elstad* provides no valid basis for the admissibility of the tainted statements at issue in this case.

CONCLUSION

Petitioner contends that this Court's holdings in *Elstad* and *Seibert* have "created an uncertain legal framework whenever the police initially fail to mirandize a suspect". Further, that "[w]ithout a settled precedent, courts are left on their own to determine whether a subsequent statement is never, sometimes, or almost always admissible" (Petition, p. 26).

This Court has made clear through its decisions in *Miranda, Summers, Dunaway,* as well as in Seibert, and others, that "end-runs" around an individual's constitutional guarantees are impermissible. This Court has not created an uncertain legal framework; rather, any existing uncertainty stems from the failure of law enforcement to carefully comply with constitutional mandates and clear precedent existing in the decisions of this Court. Petitioner's suggestion that courts need a clarified rule is misguided, and actually suggests an unnecessary limit upon trial courts to accommodate constitutionally deficient acts and performance by law enforcement. Trial courts are in the best position to weigh credibility. Gadwell's credibility was weighed and was found wanting. Had he *Mirandized* Mr. Davis before the interrogation, as required by this Court's clear precedents and the applicable Amendments, there would be no issue.

RELIEF

Wherefore, Respondent requests the petition be denied.

Respectfully submitted,

SHELDON HALPERN (P14560)
Attorney for Respondent
26339 Woodward Avenue
Huntington Woods, MI 48070
(248) 554-0400
Dated: August 24, 2009